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No. 81-2150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JIM MCNEFF, INC., a California corporation,
Petitioner,

v.

FRANK L. TODD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENTS

The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support of Respondents. Copies of letters written by counsel for Petitioner and Respondents granting the parties' consent to this submission are on file with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") is a non-profit, tax-exempt organization established after Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA").[1] NCCMP consists of representatives of approximately one hundred thirty-five pension and welfare

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[1] 88 Stat. 829, *et seq.*

plans, or their sponsors, through which the interests of approximately three million persons are represented. The majority of the NCCMP's affiliates operate in the building and construction industry, and include plans covering employees in virtually all of the building and construction trades. Because of the broad range of experience of the NCCMP's constituent organizations and its close, on-going contacts with the hundreds of trustees charged with operating those plans, the NCCMP believes that it is uniquely qualified to state the position of the participants and beneficiaries of such plans.

During the thirty-five years since Congress authorized the formation of jointly-trusteed employee benefit plans, such plans have become permanent, indispensable components of significant sectors of the economy where the work forces bargain collectively. At the very heart of this benefit trust fund structure, as required by Section 302(c)(5) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), is the collective bargaining process. Through that process employers enter into binding commitments with the labor organizations representing their employees to make periodic payments, at specified rates, for the duration of specified terms, to the fund trustees whose exclusive responsibility it is to administer those funds for the benefit of the employees of those employers. The trustees, in turn, being assured of receiving income to the trust in the amounts, and for the terms, specified in collective bargaining agreements, are able to design program of benefits, and to offer to the employees whose labors generate the trust income the assurance that the benefits will be available, for those with sufficient covered service to qualify, when they are needed.

This entire system, extending throughout the nation to millions of employees and their families, is absolutely dependent for its vitality on stable, secure and enforceable contractual commitments by employers to make, in a timely fashion, agreed-upon benefit trust fund contribu-

tions for the agreed-upon term of any contract. Examination of the "comprehensive and reticulated" regulatory scheme set forth in ERISA, *Nachman v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980), makes abundantly clear the Congressional assumption that enforceable collective bargaining agreements requiring employer contributions are the essential ingredient upon which the entire system depends.

ERISA imposes on fund trustees the obligation to comply with detailed minimum standards governing participation, funding, vesting, and reporting and disclosure, and with stringent standards of fiduciary responsibility for providing employee benefit trusts with the income they require. Congress took this approach in 1974 on the understanding that the required system of financing these trusts through collective bargaining was already in place. This is made clear by examining certain of the definitional and substantive requirements imposed by ERISA. Thus, for example, a "multiemployer plan" is, by definition, one "to which more than one employer *is required* to contribute" (emphasis added).[2] This definition is further elaborated in regulations issued by the Internal Revenue Service. No multiemployer plan is deemed to exist in the absence of "a legally enforceable agreement to establish such a plan signed by the employer," in which legally enforceable agreement "[t]he employer contributions to be made to the plan are set forth. . . ."[3]

The statutory obligations on plan trustees, with regard both to participants and beneficiaries and to contributing employers, also rest on the understanding that the

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[2] ERISA § 3(37)(A), as amended, 29 U.S.C. § 1002(37)(A). The same requirement was contained in ERISA as enacted in 1974.

[3] 26 C.F.R. § 1.410(a)-2(i)(2); 26 C.F.R. § 1.411(a)-2(c)(2); *see also* 26 C.F.R. § 1-414(f)(1) defining a multiemployer plan as one in which "[m]ore than one employer *is required* by the plan instrument or other agreement to contribute (or to have contributions made on its behalf) to the plan. . ." (emphasis added).

contractual arrangements binding employers to the plans are enforceable. Thus, under ERISA, trustees are obligated to grant credit to participating employees, for participation, vesting, and benefit accrual purposes, for each hour in a participating employer's service for which the employee is paid, or is entitled to be paid, by the employer.[4] Employees are, moreover, entitled to receive credit for all such hours of service regardless of whether or not their employers have, in fact, paid the contributions required of them.

> Whether payments to the trust have or have not been made by the employer is not relevant in the determination as to whether an employee qualifies.
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> [*Central States, Southeast and Southwest Areas Pension Fund v. Hitchings Trucking Co.*, 472 F. Supp. 1243, 1247 (E.D. Mich. 1979); *accord*: *Central States, Southeast and Southwest Areas Pension Funds v. McNamara Motor Express, Inc.*, 503 F. Supp. 96 (W.D. Mich. 1980); *Central States Fund v. Central Transport*, —— F. Supp. ——, 2 EBC 1844 (E.D. Mich 1981).]
>
> [C]redit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions.
>
> [Advisory Opinion Letter 76-89 issued by the Department of Labor on August 31, 1976, reprinted in 221 BNA Pension Reporter R-24.]

Trustees' obligations under ERISA vis-a-vis participating employers are equally clear. When any employer participating in a plan fails to make the contribution payments called for in its contract, in full and on time, that plan's trustees are obliged to make

> such reasonable, diligent and systematic efforts as are appropriate under the circumstances

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[4] ERISA §§ 202, 203 and 204, 29 U.S.C. §§ 1052, 1053, and 1054; 29 C.F.R. § 2530.200b-2.

to collect for the trust those delinquent contributions. Prohibited Transaction Exemption 76-1 issued by the Department of Labor on March 26, 1976, reprinted in 79 BNA Pension Reporter R-5. When necessary to collect those delinquencies, moreover, the trustees' fiduciary responsibility under ERISA requires them to sue delinquent employers to enforce the trusts' right to receive the promised contributions. *See, e.g., Rosen v. Hotel and Restaurant Employees Pension Fund*, 637 F.2d 592 (3rd Cir. 1981), *cert. denied*, 50 L.W. 3278 (1982). *See also* Advisory Opinion Letter 78-28 issued by the Department of Labor on December 5, 1978, reprinted in 221 BNA Pension Reporter R-25.

Petitioner now urges the Court to rule that, with respect to agreements entered into under Section 8(f) of the National Labor Relations Act,[5] no such enforceable contractual arrangement is possible. If petitioner is correct, § 8(f) contracts are not "contracts" at all.[6] And if petitioner is correct, the entire pension benefit system in the construction industry is undermined. For in the absence of an *enforceable* agreement binding an employer to a fund, the employer's participation in the fund is not secured; its contributions (if any) to the fund are unlawful;[7] and its employees' service under the § 8(f) agreement need not—indeed, may not—be credited by the trustees.

The grave problems which petitioner's formulation would cause such funds would, of course, be greatly compounded if, as petitioner suggests, § 8(f) agreements have no binding effect when they are signed, but can be

[5] 29 U.S.C. § 158(f).

[6] "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts, § 1.

[7] *See* § 302(a) and (c)(5) of the LMRA, 29 U.S.C. § 186(a) and (c)(5).

transformed, by the occurrence over time of events of which the trustees have no notice, into fully enforceable collective bargaining agreements. Given the scope and variety of those trustee obligations which arise when, and *only when*, an employer becomes contractually bound to participate in a plan (see pp. 3-5 *supra*), fulfillment of those obligations under § 8(f) contracts, construed as petitioner urges, would plainly be a practical impossibility. There simply is no feasible way for plan trustees to determine, on a contract-by-contract, job-by-job basis when majority status has been successfully attained, triggering the employer's obligation to contribute, the trustees' duty to enforce that obligation, and the employees' right to receive service credit under the plan.

It is, we believe, clear that precisely because of these dangers to construction industry pension plans, Congress enacted § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 [8] ("MPPAA") to assure that the promises in collectively bargained agreements, including those signed under § 8(f), are enforceable according to their terms.

SUMMARY OF ARGUMENT

Petitioner McNeff, Inc. argues here that the collective bargaining agreement it entered into with Local 12 of the International Union of Operating Engineers, and under which it agreed to make regular contribution payments to the respondent employee benefit trusts, is not enforceable by those trusts because it was a § 8(f) agreement, and because the trusts did not prove that Local 12 had enjoyed majority status during the period for which contributions were sought.

McNeff, Inc. thus invites the Court to ignore the long history of collective bargaining under the sanction of §8(f) which has developed in the construction industry, and the correlative development of construction industry

[8] Pub. L. 96-364, 94 Stat. 1208, *et seq.*

employee benefit plans which depend for their existence on the vitality of § 8(f) contracts.

That effort cannot succeed. Whatever ambiguities may have existed prior to 1980 regarding the intended scope and effect of employee benefit trusts' rights under § 8(f) contracts were unmistakeably eliminated by Congress' enactment of § 306(a) of MPPAA. Based upon its findings that the remedies previously available to benefit plan trustees for enforcing those plans' rights against contributing employers were inadequate in light of the clear public policy mandate that such be strengthened, Congress provided a clear and unambiguous federal law remedy designed to make trustees' collection actions like the one at bar simple, efficient, and effective, and to discourage employers like McNeff, Inc., who sign agreements requiring the payment of contributions to employee benefit funds, from flouting those contractual obligations.

Nor can there be any doubt that the Congressional purpose of precluding employers from asserting "extraneous" defenses in collection actions brought under § 306(a) was intended to encompass the very defense raised in this case by McNeff, Inc. Indeed, the evidence cited in the legislative history of MPPAA to demonstrate the need for provision of a more effective collection remedy included two earlier court decisions in which the same defense had been successfully asserted by a delinquent contributing employer. Congress made clear that, in its legislative judgment, those cases incorrectly applied the law, and undertook in § 306(a) to assure that those judicial errors would not be repeated.

The policy considerations which Congress believed made MPPAA necessary, moreover, are consonant with, and fortified by, the more general policy, most recently reaffirmed by this court in *Kaiser Steel Corp. v. Mullins*, —— U.S. ——, 50 L.W. 4152 (January 13, 1982), that except where a contract purports to require conduct which is itself unlawful, the courts must not permit a contracting party to enjoy the fruits of his bargain without pay-

ing the agreed-upon price for those benefits. Because that is precisely what McNeff, Inc. attempts to do here, and because both the Congress and this Court have made clear that McNeff, Inc. is not entitled to any such windfall, the decision of the Court of Appeals should be affirmed.

ARGUMENT

IN ENACTING § 306(a) OF THE 1980 MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT CONGRESS REAFFIRMED ITS DETERMINATION TO PRECLUDE THE DEFENSE THAT THE UNDERLYING AGREEMENT IS ONE PERMITTED BY § 8(f) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND THAT THE UNION SIGNATORY LACKS MAJORITY STATUS.

In this suit brought by the Trusts[9] to collect fringe benefit contributions, it is undisputed that McNeff, Inc. was a signatory to a collectively bargained agreement[10] whose terms provided for the payment of such contributions for the employment by McNeff of operating engineers beginning on and after September 13, 1978, the date the agreement was executed, that McNeff never made the payments required by that agreement, and that McNeff did not, prior to May 22, 1979, when the Company filed a petition for a National Labor Relations Board representation election, take any action to abrogate or cancel the agreement. McNeff's primary defense here is that the Trusts are required to prove not only the existence and terms of the agreement and the employment of the type covered by the agreement but also that Local 12 IUOE, "the

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[9] The Operating Engineers Health & Welfare Fund, the Operating Engineers Pension Trust, the Operating Engineers Vacation-Holiday Savings Trust and the Operating Engineers Training Trust.

[10] An agreement entered into pursuant to § 8(f) of the National Labor Relations Act is a collective bargaining agreement. *Woelke & Romero Framing, Inc. v. NLRB*, —— U.S. ——, 50 L.W. 4538, 4543 (1982).

union signatory to the agreement [was, during the period September 13, 1978-May 22, 1979,] the majority representative of the employer's employees" (Pet. Br. i). As we now show, a central purpose of § 306(a) of MPPAA is to make it plain that employers such as McNeff, Inc. have no such defense to a fringe benefit collection action arising under a § 8(f) agreement.

A. Section 306(a) Of MPPAA Applies To This Case

The collective bargaining agreement here was, as we have noted, executed on September 13, 1978, this collection suit was brought on April 29, 1979, MPPAA was signed into law on September 26, 1980, and this Court in *Kaiser Steel Corp. v. Mullins*, *supra*, 50 L.W. at 4156, left open the question of whether § 306(a) of MPPAA is to be given only prospective effect. We therefore begin by demonstrating that § 306(a) does apply to this case.[11]

The governing principle is "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). The opinion in *Bradley* traced the origin and the justification for this rule to Chief Justice Marshall's words in *United States v. The Schooner Peggy*, 1 Cranch 103, 110 (1801). *See* 416 U.S. at 711-712. The *Bradley* Court noted that *The Schooner Peggy* left it "unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, as was true of the convention under consideration in *The Schooner Peggy*, or, conversely, whether such a change in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases." 416

[11] It is the NCCMP's position that the rejection of the McNeff, Inc. defense as dictated by MPPAA is consistent with preexisting law and that, as its sponsors stated, MPPAA § 306(a) clarifies that preexisting law, but that in any event MPPAA § 306(a) governs.

U.S. at 712-713 (emphasis in original). The Court observed further that "in *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), the broader reading of *The Schooner Peggy* was adopted, and this Court ruled that 'an appellate court must apply the law in effect at the time it renders its decision.' *Id.* at 281." 416 U.S. at 714. Moreover, after describing *Thorpe*, the *Bradley* Court said that case "thus stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." 416 U.S. at 715.

Accordingly, *Bradley* "reject[ed] the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.* Rather, the party which would give the legislation only prospective effect has the burden of establishing that this was the legislative intent. A reading of the legislative history of § 306(a) of MPPAA reveals no evidence whatsoever of an intent to provide only for a prospective effect. Moreover, as we develop at pp. 21-25, *infra*, the evidence in this instance precludes such a limited reading; sponsors of the amendment explained that "the bill clarifies the law" as opposed to changing the law, and the sponsors' overriding concern was to further the financial stability of employee benefit funds, a result best achieved by applying MPPAA to pending cases.

To be sure, "exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision 'ha[ve] been made to prevent manifest injustice,'" *Bradley, supra*, 416 U.S. at 716-717. But an employer who has executed a collective bargaining agreement and then decides to ignore the promise contained in that agreement cannot invoke the "manifest injustice" exception. The equities in this situation are clearly on the side of the Trusts which, under the agreement, are entitled to receive fringe benefit contributions, and their beneficiaries. No breaching employer ought to be heard to

assert that in entering into the collective bargaining agreement, and in obtaining the labor contracted for pursuant to the agreement, the employer did not intend to and should not be required to make the promised contribution.

B. One Of Congress' Central Purposes In Enacting § 306(a) Of MPPAA Was To Deny Employers The Precise Defense At Issue In This Case

1. Section 306(a) of MPPAA added a § 515 to ERISA, 29 U.S.C. § 1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.[12]

These bare words alone indicate that Congress' intent was to require strict observance of the "*terms* of a collectively bargained agreement" where those terms provide that the "employer * * * is obligated to make contributions to a multiemployer plan" unless observing the terms of the agreement is "inconsistent with law." Prior to enactment of § 306(a) it was well-settled that an employer who breaches a collective bargaining agreement providing for fringe benefit payments is subject to suit for breach of contract under § 301 of the LMRA, 29 U.S.C. § 185. *See, e.g., Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). Even if the legislative record were otherwise silent, the fact that Congress chose to enact yet a second federal law providing for the enactment of the duty to make such payments clearly demonstrates

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[12] Section 306(b) of MPPAA, 94 Stat. 1295, added a § 502(g)(2), 29 U.S.C. § 1132(g)(2), to ERISA which provides a clear statutory right of action to enforce § 515, as well as for mandatory awards of interest, liquidated damages, and attorneys' fees against delinquent employers.

that § 306(a)'s purpose is to insure that such agreements are enforceable according to their terms, where those terms are not inconsistent with law, thus limiting the signatory employers' defenses and simplifying and expediting collection actions.

What the language of § 306(a) suggests its authoritative explanation confirms.

ERISA is a "comprehensive and reticulated statute" enacted in 1974 to protect the benefit expectations of participants and beneficiaries of private pension and welfare plans, including multiemployer plans. *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 510 (1981), *quoting*, *Nachman Corp. v. PBGC*, *supra*, 446 U.S. at 361.[13] Finding that the private employee benefit plan system is "affected with a national public interest" in providing for the "well-being and security of millions of employees and their dependents," 29 U.S.C. § 1001(a), Congress declared the regulation of private employee benefit plans to be exclusively a federal concern. *Alessi*, *supra*, 451 U.S. at 523.

The MPPAA amendments to ERISA were prompted by Congressional anxiety about the financial stability of multiemployer pension plans and concern that the maintenance and growth of such plans was being discouraged. *See* MPPAA § 3, 29 U.S.C. § 1001a. *See generally* Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H.Rep. No. 96-869 (Part I), 96th Cong., 2d Sess. (April 2, 1980). Congress recognized that millions of retirees and employees are dependent on multiemployer plans for their retirement in-

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[13] ERISA generally establishes certain reporting and disclosure requirements, sets minimum standards for participation, vesting, benefit accrual, plan funding, and plan fiduciary conduct, provides for civil and criminal enforcement of the Act, and creates a termination insurance program to protect plan participants against loss of certain benefits upon plan termination. *See* 29 U.S.C. § 1001, *et seq.* *See generally Nachman*, *supra*.

come security, and sought by enacting MPPAA to enhance the financial soundness of such plans and to foster their maintenance and growth. *Id. See also NLRB v. Amax Coal Co.*, 453 U.S. 322, at 338 n.22.[14]

MPPAA is the product of S. 1076, 96th Cong., 1st Sess. (1979) and H.R. 3904, 96th Cong., 1st Sess. (1979) which were introduced in Congress as companion bills during May 1979. Neither bill contained any provision relating to delinquent contributions. At that time, the focus of the legislation was the imposition of stricter funding requirements and of an obligation (described as "withdrawal liability") on employers who withdraw from participation in such plans to continue making payments to the plans after their withdrawal until such time as they have funded an aliquot share of the plans' unfunded pension liabilities. *See* MPPAA § 104(2), 29 U.S.C. §§ 1381-1405.[15]

The bills did not progress very far through the legislative process, however, before it became apparent to Con-

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[14] Towards this end, in addition to addressing the problem of delinquent employer contributions, MPPAA generally requires plans to fund their benefit liabilities over a shorter period of time (MPPAA § 304(b), 29 U.S.C. § 1082(b)), provides for plan reorganization and increased funding in times of financial difficulty (MPPAA § 104(2), 29 U.S.C. §§ 1421-1424), authorizes the Pension Benefit Guaranty Corporation to provide financial assistance to struggling plans (MPPAA § 104(2), 29 U.S.C. § 1431), imposes withdrawal liability on employers which cease contributing to plans (MPPAA § 104(2), 29 U.S.C. §§ 1381-1405), and amends the benefits guaranty program to make plan insolvency rather than termination the event that triggers the guaranty (MPPAA § 102, 29 U.S.C. § 1322(a)), to reduce guaranty levels (*id.*) and to increase plan insurance premiums (MPPAA § 105, 29 U.S.C. § 1306).

[15] Congress found that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations. . . ." MPPAA § 3(a)(3), 29 U.S.C. § 1001a(a)(3). *See generally* H.Rep. No. 96-869 (Part I).

gress that the financial instability of multiemployer plans was attributable in substantial part to the failure of employers to make full and timely contributions to such plans. The Senate Labor and Human Resources Committee, the first Senate committee to consider S.1076, amended the bill to include a provision which eventually became § 306 of MPPAA.[16] *See* S.1076, § 308, Staff of the Senate Committee on Labor and Human Resources, S.1076: the Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. 242-243 (unnumbered Committee Print, April 1980).[17] The purpose of this

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[16] Section 308(a) of the Labor Committee bill would have added the following as § 515 to ERISA:

> Every employer who is obligated under the terms of a collectively bargained multiemployer plan (or under the terms of a collective bargaining agreement related to the plan) shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 308(b) would have added the following § 502(g)(2) to ERISA providing for recovery of interest, liquidated damages, and attorneys fees in contribution collection suits:

> In any action under this title by a fiduciary for or on benalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan the unpaid contributions, interest on the unpaid contributions, an additional amount equal to interest on the contributions as liquidated damages, a reasonable attorney's fee and costs of the action, to be paid by the defendant, as well as such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions is determined using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954, as amended.

This latter language, with minor modifications accommodating a similar provision in the House-passed bill, became § 306(b) of MPPAA.

[17] Because S.1076 was also referred to the Senate Committee on Finance, no formal report was issued by the Labor and Human Resources Committee as Senate rules require a joint report under such circumstances. *Central States Pension Fund v. Alco Express Co.*, 522 F.Supp. 919, 928 n.11 (E.D.Mich. 1981).

delinquent contributions provision was explained in the following terms:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.
>
> *Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly.* Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. *Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.*
>
> *The public policy of this legislation to foster the preservation of the private multiemployer plan*

> *system mandates that provision be made to discourage delinquencies and simplify delinquency collection.* The bill imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.
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> [*Id.* at 243-44 (emphasis added).] [18]

In the House, the Ways and Means Committee took up consideration of H.R.3904 after that bill had been favorably reported by the House Education and Labor Committee without any provision on delinquent contributions. The Ways and Means Committee amended the House bill to provide for the assessment of attorneys' fees and liquidated damages in an action to collect delinquent employer contributions as well as in an action to collect employer withdrawal liability. *See* H.Rep. No. 96-869 (Part II), 96th Cong., 2d Sess. 48-49, 89 (1980).[19] The Ways and

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[18] This was not the first time that the Senate Labor Committee had considered the serious financial impact of employer delinquencies on multiemployer plans. *See generally Alco Express Co., supra,* 522 F. Supp at 926 n.8.

[19] That provision would have added a § 502(1) to ERISA providing as follows:

> In any civil action against any person to collect delinquent contributions to or under a multiemployer plan, if the plan so provides the court may award the plantiff—
>
> (1) a reasonable attorney's fee and costs of action, and
>
> (2) liquidated damages (not in excess of 20 percent of the delinquency as determined by the court).
>
> Nothing in the preceding sentence shall be construed to limit any remedy permitted under any other provision of Federal or State law.

Means delinquency provision was included in the version of H.R.3904 unanimously passed by the House of Representatives on May 22, 1980. *See* 126 Cong. Rec. H4113-4171 (daily ed., May 22, 1980).

Following House passage of H.R.3904, the Senate Committees on Finance and on Labor and Human Resources jointly reported a version of S.1076 which reflected many of the amendments made to H.R.3904 during consideration of that bill in the House. *See* 126 Cong. Rec. S9833 (daily ed., July 24, 1980); 126 Cong. Rec. S10070 (daily ed., July 29, 1980). That joint Finance Committee-Labor Committee bill included a § 306 which amalgamated the delinquent contributions provisions of the House-passed bill and of the Senate Labor Committee bill.[20] *See* 126 Cong. Rec. S10094 (daily ed., July 29, 1980). Section 306 was included in the final Act without further change.

The decision to enact § 306(a) of the MPPAA as proposed by the Senate Labor Committee met with universal favor. We have not found a word in the legislative history contradicting or qualifying that Committee's explanation of the provision's overall purpose (and as we show at pp. 22-24, *infra*, the later elaborations on that statement by the legislation's sponsors reaffirm the points made by the Committee). The Senate Labor Committee's statement, we submit, corroborates what the decision to enact the section implies and what the words of § 306(a) say: that "the public policy of this legislation to foster the preservation of the private multiemployer plan system *mandates* that provision be made to discourage delinquencies and simplify delinquency collection" by providing a statutory duty—clarifying preexisting law—to make fringe benefit payments in accordance with the terms of a collectively bargained agreement providing for such payments and limiting the availability of certain

[20] The Senate Labor Committee provision was amended in this amalgamation process to incorporate the 20 percent limitation on liquidated damages contained in the House bill provision. Otherwise the Senate Labor Committee provision survived intact.

defenses. Indeed, given the then existing LMRA § 301 law that collective bargaining agreements are enforceable, unless MPPAA § 306(a) is read to simplify collection actions by assuring that the benefit payment promises in such agreements are enforceable according to their terms, so long as those terms are not unlawful, the provision is rendered of no purpose or effect.

2. McNeff, Inc. argues that the terms "obligated," "collectively bargained agreement" and "to the extent not inconsistent with law" used in § 306(a) are not plain and unambiguous, and that neither that provision nor the Senate Labor Committee explanation (quoted at pp. 15-16, *supra*) say in so many words that agreements entered into pursuant to the provisions in § 8(f) are collectively bargained agreements that obligate the signatory employer to make the payments as provided by the § 8(f) agreement's terms, or that enforceing the terms of a § 8(f) agreement is "consistent with law." The short but complete answer to this argument is that it was precisely such actions as this, involving § 8(f) agreements, that the sponsors of § 306(a) identified as demonstrating the need to which that section responds. On three different occasions the floor managers of MPPAA emphasized that § 306(a) was meant to preclude the delinquent employer from raising the "extraneous" defense of the union's claimed lack of majority status. The background that explains the felt need to address this point is easily stated.

In *NLRB v. Iron Workers*, 434 U.S. 335 (1978) (hereinafter *Iron Workers*), this Court had "concluded that the Board's construction of [§§ 8(b)(7)(C) and 8(f)] of the Act [at issue in that case] although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." *Id.* at 341. The Court described that position as follows:

> Under the Board's view of § 8(f), a prehire agreement does not entitle a minority union to be treated

> as the majority representative of the employees until and unless it attains majority support in the relevant unit. Until that time the prehire agreement is voidable and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer. Accordingly, the Board holds, as it did here, that picketing by a minority union to enforce a prehire agreement that the employer refuses to honor, effectively has the object of attaining recognition as the bargaining representative with majority support among the employees, and is consequently violative of § 8(b)(7)(C).
>
> [434 U.S. at 341.]

At the conclusion of its opinion, the *Iron Workers* Court noted that the "union argues that the Board's position permitting an employer to repudiate a prehire agreement until the union attains majority support renders the contract for all practical purposes unenforceable, assertedly contrary to this Court's decision in *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962)." 434 U.S. at 351. The Court responded to that argument as follows:

> There, the Court's opinion recognized that § 301 of the Labor Management Relations Act confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as those with majority designated collective-bargaining agents. Section 8(f) contracts were noted as being in this category. The Court was nevertheless speaking to an issue of jurisdiction. That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent with *Lion Dry Goods* for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract, just as it is in a § 8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the

majority's chosen instrument, the contract is unenforceable.

[434 U.S. at 351-352.]

Iron Workers was an unfair labor practice case involving picketing which the NLRB and the Court found to be recognitional (compare *International Union of Operating Engineers, Local 150*, 255 NLRB No. 83 (1981)), rather than a § 301 court case looking to payment according to the agreement's terms for labor performed. Accordingly the Court, having made it plain that *Lion Dry Goods* was not controlling, did not pursue the question of whether such a showing is to be required in any § 301 suit.

During the two years between the *Iron Workers* decision and Congress' consideration of the legislation that became MPPAA, a division of authority developed in the district courts on the question presented in this case. The argument for enforcement was described in *Washington, Etc. v. Overhead Door Co., Etc.*, 488 F.Supp. 816 (D.D.C. 1980), decided just three months before the Senate floor debate on MPPAA:

> Funds asserts that the *Iron Workers* case is limited to the situation of attempts to enforce prehire agreements by picketing. This interpretation was espoused in *Eastern District Council v. Blake Construction Co.*, 457 F.Supp. 825 (E.D.Va. 1978). The court in that case held that a pre-hire agreement, although terminable by either party at will, was enforceable, and was not in fact terminated until the employer gave reasonable notice of his intent to terminate. The employer's failure to comply with the agreement was held to constitute conduct manifesting such intent. *Id.* at 830. The court distinguished *Iron Workers*: ". . . that case dealt with the question of whether certain picketing was an unlawful labor practice and is not determinative on the facts of this case." *Id.* at 829. Relying on *Blake*, Funds argue that since Overhead has not manifested its intent to withdraw from the contract or shown that the union lacks majority support, but has signed subsequent

> agreements renewing the original one, it remains obligated to make contributions.
>
> [488 F.Supp. at 818.]

The *Overhead Door* Court rejected the argument, however, electing to follow the lead of the district court in *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Associated Wrecking Co.*, 484 F.Supp. 582 (D.Neb. 1980) and in doing so rejected the reliance by the plaintiff fund on *Lewis v. Benedict Coal Corp.*, *supra*, and its progeny:

> The laudable policy considerations behind the decisions disallowing contractual defenses in trust fund cases include guaranteeing "hard working people the unemployment, health and retirement protections that they and their families expect to receive as part of the terms of their employment" and foreclosing the "possibility that an employer will surprise its employees at a late date that it was not legally bound to provide for contingencies that may afflict them or their families in the future." *Huge v. Long's Hauling Co.*, at 465. These very important concerns, however, are absent in a case such as the instant one involving, as it does, a voidable agreement upon which no reasonable expectations of future benefits may be based.
>
> [488 F.Supp. at 819.] [21]

Accordingly, during the July 29, 1980 Senate floor debate on the joint Finance Committee-Labor Committee version of S.1076, Senator Matsunaga asked Senator Williams, the Chairman of the Labor Committee and a sponsor and the floor manager of S.1076, about the impact of the bill's delinquent contributions provisions on cases

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[21] The same analysis led to the same conclusion in *Western Washington Laborers—Employers Health & Security Trust Fund v. McDowell*, —— F.Supp. ——, 103 LRRM 2219 (W.D. Wash.) which was decided in December 1979. *McDowell*, like *Overhead Door*, was an action brought by multiemployer trust funds to enforce the contribution provisions of a § 8(f) agreement.

such as the district court decision in *Overhead Door Co., supra*:

> *Mr. Matsunaga*: If the floor manager will yield further, the recourse available to multiemployer pension plans under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. May I inquire of the floor manager, does the bill improve the legal recourse available to plans against delinquent employers?
>
> *Mr. Williams*: Yes, it does . . . . On the whole question of delinquent contributions and the withdrawal liability collection, the bill provides a direct and I suggest unambiguous cause of action under ERISA to a plan against a delinquent employer.
>
> *Mr. Matsunaga*: If I may pose a further question, *in some recent cases such as the Washington Area Carpenters Fund Overhead Door Co. case, a simple collection action brought by plan trustees, has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?*
>
> *Mr. Williams*: *I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.*
>
> Further, plan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises. *The bill clarifies the law in this regard* by providing a direct ERISA cause of action against a delinquent employer without regard to extraneous claims or defenses.
>
> *Mr. Matsunaga*: The Senator, of course, will agree that the provisions for employer withdrawal liability are central to this legislation. Will these same principles apply to claims by a plan for withdrawal liability?

Mr. Williams: Affirmative. Like suits to collect delinquent contributions, it is intended that a plan's claim for withdrawal liability not be subject to extraneous claims and defenses.

[126 Cong. Rec. S10102 (daily ed., July 29, 1980) (emphasis added). *See also Kaiser Steel Corp., supra*, 50 L.W. at 4156 n.12.]

The Senate-passed S.1076 was sent to the House as a substitute bill for the House version. During House consideration of the Senate substitute, Representative Thompson, floor manager of H.R. 3904, gave the following explanation of the purpose and meaning of § 306 of the Senate bill, elaborating on the earlier Senate reports and floor statements:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. *Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law*—other than 29 U.S.C. § 186. *Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.* In this regard we endorse judicial decisions such as *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir., 1962); and *Huge v. Long's Hauling Company, Inc.*, 590 F.2d 457 (3d Cir., 1978). *Cases such as Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, —— F.Supp. ——, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Company*, C.A. No. 79-0097, U.S.D.C. D.C., April 22,

> 1980, *are considered to have been incorrectly decided* and *this legislation is intended to clarify the law* in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.
>
> These same principles apply to a plan's claim for employer withdrawal liability assessed in accordance with this legislation.
>
> The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection.
>
> [126 Cong. Rec. H7899 (daily ed., August 26, 1980) (emphasis added).]

The next day during the Senate floor debate on whether to accept certain House amendments to the Senate bill, Senator Williams gave precisely the same explanation of § 306. (126 Cong. Rec. S11673 (daily ed., August 26, 1980.) We have not found any statement in the legislative record contradicting or qualifying Senator Williams' or Representative Thompson's explanations of § 306.

These specifications of what § 306(a) means, which are completely consistent with and give content to that provision's general words, carry great weight. As the Court stated in *North Haven Board of Education v. Bell*, —— U.S. ——, 50 L.W. 4501 (May 17, 1982), the most recent decision discussing the significance of such floor statements and one which concerned a remarkably similar legislative situation:

> Although the statements of one legislator made during debate may not be controlling, *see, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction. *See, e.g., FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564

(1976) (such statements "deserv[e] to be accorded substantial weight . . . .") ; *NLRB v. Fruit Packers*, 337 U.S. 58, 66 (1964) ; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951). And, because §§ 901 and 902 originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements—which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks—are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902.

[50 L.W. at 4504.]

The Congressional intent to resolve the issue in this case against the position of McNeff, Inc. is manifest. By specifically repudiating the line of district court decisions holding the contribution provisions of § 8(f) agreements unenforceable by plan trustees absent the trustees' ability to satisfy the court as to the union's majority status, Congress left no doubt that § 8(f) agreements do fall within the scope of § 306 of MPPAA and that the lack of majority status is not a defense to contribution collection suits brought by plan trustees.[22]

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[22] That the lack of union majority status is not a defense to suits by pension funds to collect employer withdrawal liability is also made clear by the floor managers' above-quoted statements. Like the collection of delinquent contributions, the collection of withdrawal liability from employers was deemed "central to this legislation." And "[l]ike suits to collect delinquent contributions, it [was] intended that a plan's claim for withdrawal liability not be subject to extraneous claims and defenses." *See* Williams-Matsunaga colloquy quoted at pp. 22-23, *supra*. *See also* Representative Thompson's statement quoted at pp. 23-24, *supra*. Withdrawal liability is generally assessed when an employer which has been "obligated to contribute" to a plan ceases to be so obligated. *See* 29 U.S.C. § 1383. The close relationship of contribution collection and collection of withdrawal liability in the legislature's eyes is reflected in ERISA § 4221(d), 29 U.S.C. § 1401(d), as added by MPPAA § 104(2), which treats non-payment of withdrawal liability as non-payment of contributions under ERISA § 515.

3. The legislative rejection of the lack of union majority defense reflects a recognition that permitting employers to raise such a defense to enforcement of their contribution promises would convert contribution collection actions into "lengthy, costly and complex litigation" contrary to the legislative purpose of simplifying and expediting the collection process. Consideration of such a defense would necessarily and impermissibly embroil the judiciary in determining appropriate bargaining units in which to measure the signatory union's majority status, identifying the members of the bargaining units, and evaluating the proofs of majority status. *See* 29 U.S.C. § 159. *See also generally* NLRB General Counsel Guidelines on Construction Pre-Hire Agreements, *reprinted in* 1979 Labor Relations Yearbook 349-364 (BNA 1980); *Giordano Construction Co.*, 256 NLRB No. 10, 107 LRRM 1164 (1981). These inherently factual representation issues have heretofore been deemed to fall within the exclusive province of the National Labor Relations Board. *South Prairie Construction Co. v. Local No. 627, IUOE*, 425 U.S. 800, 804-805 (1976). Such issues are "extraneous" and "unrelated" to the enforcement by the courts of the employer's promise in its § 8(f) agreement to make contributions to employee benefit trust funds.

The district court opinion in *Overhead Door* well illustrates the morass in which courts would be entangled if required to probe the representative status of the signatory union in collection suits brought by fund trustees. The court in that case would have conditioned enforcement of the contribution obligation of the employer on the fund trustees affirmatively proving that the union had the support of a majority of employees at each of the employer's jobsites over the 10-year period during which the employer's § 8(f) agreement was in effect. *See* 488 F.Supp. at 819.

In addition to involving the courts in deciding issues committed by statute to the NLRB, cognizance of the

lack of majority status defense in trustee collection actions would interject fund trustees into union-employer disputes of the type from which national pension and labor policies have sought to insulate them. *See NLRB v. Amax Coal Co., supra; Lewis v. Benedict Coal Corp., supra.*

4. The attention of MPPAA's sponsors to the particular collection problems of construction industry multiemployer plans operating under § 8(f) agreements, reflected in the statements quoted at pp. 22-24, *supra*, was an extension of Congress' long-standing recognition that the construction industry presents atypical characteristics which fundamentally affect the nature of collective bargaining in that industry. In its consideration of the problems which made MPPAA necessary, Congress once again recognized those characteristics. In light of these special industry characteristics, and of the large number of workers and their families dependent on such plans for retirement security,[23] MPPAA provides special employer withdrawal liability rules for construction industry pension plans. *See* ERISA § 4203(b) and § 4308(d)(1), 29 U.S.C. §§ 1383(b), 1388(d)(1), as added by MPPAA § 104(2). The need for these special withdrawal rules was described as follows in H. Rep. No. 96-869 (Part I) at 75-76:

> In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career,

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[23] *See* PBGC: Recommendations to the Congress for Revising Multiemployer Plan Termination Insurance, at 2, n.2 (February 1979): "[A]bout one-half of all covered multiemployer plans and one-fourth of all participants are in the construction industry, which is characterized by irregular employment. These multiemployer construction industry plans cover about two-thirds of total construction industry employment."

> and the volume of work for a given employer will often fluctuate greatly from year to year. These normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designed to impose liability only on former contributors that continue to work within the plan's area.[24]

The foregoing excerpts from the MPPAA legislative history, which closely resemble the Congressional rationale for enacting § 8(f),[25] demonstrate that Congress understood that construction industry multiemployer plans are dependent for their very survival on § 8(f) agreements. If McNeff, Inc.'s position is upheld, such plans will no longer be able to depend on the contribution promises contained in § 8(f) agreements contrary to the assumptions which lie at the heart of the MPPAA regulatory scheme for the construction industry.

5. The foregoing, we believe, demonstrates that McNeff, Inc. is wrong in its contention that the "not inconsistent with law" language in § 306(a) precludes the enforcement of § 8(f) agreements under § 306(a). But since this Court has already had occasion in *Kaiser Steel Corp. v. Mullins*, *supra*, to construe that clause, we add a final word on the impact of that decision here. As the *Kaiser Steel* opinion emphasized, the limits of the "inconsistent with law" defense were well settled in this Court at the

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[24] *See also* Senate Labor Committee—Finance Committee Joint Explanation of S. 1076, 126 Cong. Rec. S10116 (daily ed., July 29, 1980) and remarks of Representative Thompson at 126 Cong. Rec. H7900 (daily ed., August 26, 1980).

[25] "There were two aspects peculiar to the building trades that Congress apparently thought justified the use of prehire agreements with unions that did not represent a majority of the employees: . . . The Senate Report also noted that '[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers.'" *Iron Workers*, 434 U.S. at 348-349.

time Congress was considering MPPAA. In that opinion the Court quoted with approval the following passage from *Kelly v. Kosuga*, 358 U.S. 516, 520-521 (1959): "[p]ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful * * * the courts are to be guided by the overriding general policy . . . 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" 50 L.W. at 4154. *Kaiser Steel* holds that § 306(a) through its "not inconsistent with law" language maintains that policy. 50 L.W. at 4153.

The legislative history of § 306(a) makes it plain that, with that one exception, the MPPAA policy applicable in the § 8(f) agreement context as well as all others is to "prevent people from getting other people's [labor] for nothing [or less than the agreed-upon payment] when they purport to be buying it." In Senator Williams' apt summary, "plan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises." 126 Cong. Rec. S10102 (daily ed., July 29, 1980) (remarks of Senator Williams). *See also* 126 Cong. Rec. S11673 (daily ed., August 26, 1980) (remarks of Senator Williams); 126 Cong. Rec. H7899 (daily ed., August 26, 1980) (remarks of Representative Thompson).

6. McNeff, Inc. finally asserts that the reading of § 306 (a) and its legislative history just stated assumes that Congress implicitly repealed § 8(f). We have made no such assumption. The floor statements of the sponsors of § 306(a) demonstrate their view that under then-existing law an employer could not preclude enforcement by fund trustees of its pension contributions under a § 8(f) agreement on the basis that the signatory union had not attained majority status. On that view, the district court decisions barring enforcement of contribution obligations under § 8(f) agreements were "incorrectly decided" under *Lewis v. Benedict Coal Corp.*, *supra*, and

its progeny. *See* pp. 22-24, *supra*. Hence there was no need to repeal any law but only to "clarify" and reaffirm preexisting law to prevent repetition of the errors of *Overhead Door Co.* and *McDowell*.

Whether Congress' perception of the status quo with respect to the enforceability by plan trustees of § 8(f) prehire agreements was accurate or not is irrelevant. "[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Woelke and Romero Framing, Inc.*, *supra*, 50 L.W. at 4541, *quoting*, *Brown v. GSA*, 425 U.S. 820, 828 (1976). Here Congress perceived, correctly we believe, that the law prior to MPPAA permitted plan trustees to enforce employer promises in § 8(f) agreements to make pension contributions, notwithstanding the minority representative standing of the signatory union. Accordingly, no repeal was thought to be necessary and the Congressional intent to preclude the lack of majority status defense must be implemented.

CONCLUSION

For all the reasons set forth above, the NCCMP urges this Court to affirm the decision of the Court of Appeals in this case.

Respectfully submitted,

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